IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

THE RAYMOND BAG COMPANY,
Appellant,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,
Appellee.

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM.

ARGUMENT.

Appellee's motion to dismiss or affirm should be denied for the reason that appellee's whole position is predicated upon the alleged propriety of taxing federal securities provided the tax is guised as being one upon a franchise even though it has a direct impact and incidence upon the securities themselves. A consideration of each of the appellee's points set forth in the statement opposing jurisdiction and motion to dismiss or affirm confirms this.

A. Part II of appellee's statement opposing jurisdiction contends that because Ohio Revised Code Section 5733.01 characterizes the tax as one on corporate franchises, the measurement of that tax upon a base comprising the value of the corporation's net worth, including therein the value of federal securities owned by the corporation, is proper. Appellee cites *Society for Savings v. Coite,* 6 Wall., 594, and *Provident Institution v. Massachusetts,* 6 Wall., 611, in support of the contention.

There are complete and specific refutations of appellee's argument.

1. The authorities cited and relied upon by appellee are clearly distinguishable upon their facts from the case at bar.

a. In the authorities cited by appellee, the franchise tax imposed was measured by bank deposits; it was not measured or affected by the government securities in which the deposits had been invested by the banks. This is not true in the case at bar.

b. No evidence was adduced in those cases and none was possible of a direct incidence of the tax upon the federal securities; what the banks did with their deposits after they were received by the banks, whether invested in federal securities or otherwise, could not result in a direct tax being imposed upon the federal securities. This is not true in the case at bar.

c. No evidence existed in the bank cases establishing that an increase or reduction in the value and amount of federal securities owned had a direct effect upon the amount of the tax paid; the tax being based upon something other than federal securities, it could have no impact upon those securities in the bank tax cases. This is not true in the case at bar.

2. The following facts, in the case at bar, distinguished it from the bank cases cited by appellee:

a. The franchise tax is measured in material part by the value and amount of federal securities owned by taxpayer and required to be listed at value.

b. The uncontradicted and only testimony in the case shows that an increase or decrease in the amount and value of the federal securities in the appellant's net worth results in a direct and immediate increase or decrease in the amount of the tax base and of the tax paid.

c. Unlike the *Coite* case, 6 Wall., 594, 611, the tax here is not computed "wholly irrespective of their (securities) market value or of the disposition of the funds made by the * * *" taxpayer. The determination of the tax is predicated entirely and specifically upon the value of the corporate net worth, including therein all property owned by it, at a value, even federal securities.

d. Appellee fails to distinguish between a franchise tax imposed upon the base of the corporation's nominal capital and a tax imposed upon the corporation's net worth. This distinction was observed as valid by Mr. Justice Clifford in the *Provident* case, 6 Wall., 632, where the court indicated that an imposition upon the nominal capital of the bank, *without regard to value,* was proper. Where, however, the tax base is composed of corporate property at its value, the tax is deemed to have direct incidence upon that property because that is the way property is taxed. This principle has been observed by this Honorable Court in the *New Jersey Insurance Company* case, 338 U. S., 665, at 673, where Mr. Justice Clark said:

> "It matters not whether the tax is, as appellee contends, an indirect or excise levy on net worth measured by corporate capital and surplus, or is, as appellant urges, a tax on personal property based on a valuation gauged by capital and surplus. Our inquiry is

> narrowed to whether in practical operation and effect the tax is in part a tax upon federal bonds. We can only conclude that the tax authorized * * * whether levied against capital and surplus, less liabilities or against entire net worth, is imposed on such securities regardless of the accounting label employed in describing it."

This Honorable Court in *New Jersey Insurance Company v. Division of Tax Appeals,* 338 U. S., 665, at 674, observed the existence of these distinctions (see footnote 6). We, therefore, assert this case is readily distinguishable from the *Coite* case, 6 Wall., 594, and the *Provident* case, 6 Wall., 632, relied on by appellee not only upon the basis of logic hereinbefore indicated, but upon the authority of the *New Jersey Title Insurance* case, 338 U. S., 665, at 674.

3. Appellee at page 7 of his statement opposing jurisdiction and motion to dismiss or affirm, is clearly in error when he asserts to this court that like *Society for Savings,* 6 Wall., 594, and *Provident Institution,* 6 Wall., 632, "the Ohio corporations tax is unaffected by the character of the property in which the capital stock is invested." This is obviously an incorrect conclusion. This is established by the record at bar where the sole witness testified:

> "Q. * * * If you will strike out from page 3 of Exhibit A the item 'U. S. Bonds and Tax Notes $131,626' * * * if that is stricken out what effect does that have upon the amount of the tax which would be payable by the taxpayer to the state of Ohio.
>
> "A. If that is stricken out, the net worth would be reduced and the tax base would be reduced in an exactly equal amount, and the tax would be reduced by the sum of $1.00 per thousand times that amount." (R., 23)

The fact that the tax is characterized as a franchise tax cannot save it from illegality merely by reason of that fact nor even if as appellee contends, it is not imposed if

the corporation does not enjoy its franchise. The important point is that if the corporation does enjoy its franchise, federal securities owned by it bear their full and direct amount of the tax. Thus, when the franchise tax has a direct, operative incidence upon federal securities as here it is invalid. The fact that appellant actually enjoyed its franchise does not validate the tax.

B. Part III of appellee's statement opposing jurisdiction and motion to dismiss or affirm urges that this being a franchise tax the federal securities owned by the taxpayer need not be deducted before valuing the tax base. None of the authorities cited by appellee support his proposition with the exception of *The Fifth Third Union Trust* case, 161 O. S., 169. The cases relied on by appellee at page 8 of his brief are cases not involving a net worth tax, but are franchise taxes predicated upon a tax base of corporate income, corporate dividends, bank deposits and market value of the taxpayer's shares. All of the cases cited by appellee obviously have nothing to do with a valuation or with net worth. Consequently, the character of the property owned by the corporation in the cases cited by appellee is unimportant.

C. Part IV of appellee's statement opposing jurisdiction and motion to dismiss or affirm contends no substantial federal question is presented by the appeal and urges in support thereof that the tax under review "is an excise on the privilege of exercising a corporate franchise." It is appellant's position that regardless of the characterization of the tax as a franchise excise, the true nature and character of the tax as a tax upon federal securities at their value presents a real and substantial federal question.

New Jersey Realty Title Insurance Co. v. Division, 338 U. S., 665, 673.

This court has repeatedly held that it will for itself examine the true character of the tax and in making this examination it will look to the practical operation and effect of the tax with respect to federal securities.

We respectfully submit that the practical effect of the tax in the case at bar is a direct imposition upon federal securities belonging to the taxpayer.

Respectfully submitted,

WELLMORE B. TURNER,
GUY H. WELLS,
1100 Hulman Bldg., Dayton 2, Ohio,
Attorneys for The Raymond Bag Company, Appellant.

FILED
APR 23 19
HAROLD B. WILLEY

No. 316.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

On Appeal from the Supreme Court of the State of Ohio

THE RAYMOND BAG COMPANY,
Appellant,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,
Appellee.

PETITION FOR REHEARING OF MOTION TO DISMISS OR AFFIRM

WELLMORE B. TURNER,
GUY H. WELLS,
Hulman Bldg., Dayton 2, Ohio,
Counsel for Appellant.

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus 15, Ohio

INDEX.

Petition for rehearing motion to dismiss..... 1

Werner Machine Co. v. New Jersey involved a "bona fide franchise tax" 2

Raymond Bag Co. v. Bowers after superficial similarities is distinguishable on its facts.

It does not involve a bona fide franchise tax..... 2

The Ohio court found the franchise tax was based on the value of capital stock.

Actually it was required to be valued at book net worth 3

Direct incidence of the Ohio tax on United States securities in the net worth tax base.

Specific testimony in this case of such direct incidence 4

No such testimony in Werner case..... 4

Ohio franchise tax paid to the state's general fund.... 5

Ohio court attempts to equalize franchise tax between corporations which do and do not own federal securities 5

No such attempt in Werner case 5

Raymond Bag case distinguishable from Werner case on following aspects.....5-10
1. The Ohio tax bears directly upon the federal securities in the tax base.
This effect is supported by uncontradicted testimony 5
2. Ohio taxes federal securities to equalize state taxation in a "fair" manner and to increase revenues to the general fund..... 6
3. The Ohio court has had difficulty reaching a basis for construing the franchise tax statutes 8
Wrenn case, 156 O. S., 583, overruled by Fifth Third Union case, 161 O. S., 174..... 8
4. Ohio's administration of the tax shows intention to tax federal securities 9
Name or accounting label can not change actual nature of the tax.....9-10
5. The Fifth Third Union decision establishes the tax to be on net worth as a matter of construction of the Ohio statutes 10
Such a tax will be examined by this court to see if it impinges directly on federal securities 10
A substantial federal question is believed to be presented 11
Appendix 12

Cases Cited.

Fifth Third Union Trust Co. v. Peck, 161 O. S., 169.. .....2, 4, 5, 8, 9, 10
Miller v. Milwaukee, 272 U. S., 713..... 7
New Jersey Realty Title Insurance Co. v. New Jersey, 338 U. S,. 665.....10, 11
Northwestern Insurance Co. v. Wisconsin, 275 U. S., 136 7

Raymond Bag Co. v. Bowers, 163 O. S., 275..... 2
Werner Machine Co. v. New Jersey, No. 63, October Term 2, 4, 5, 6, 8, 9, 10, 11
Wrenn Paper Co. v. Glander, 156 O. S., 583, 158 O. S., 15 8

Statutes Cited.

Federal Constitution and Statutes—
United States Constitution, Article I, Section 8... 8
31 U. S. C., Section 742 .....2, 8
State Statutes—
R. C. 5701.06 (G. C. 5323) 8, 9, 13
R. C. 5709.02 (G. C. 5328-1) 8, 9, 12
R. C. 5733.12 (G. C. 5491) 5
R. C. 5733.05 (G. C. 5498).....2, 3, 4, 8, 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 316

THE RAYMOND BAG COMPANY,
Appellant,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,
Appellee.

PETITION FOR REHEARING OF MOTION TO DISMISS OR AFFIRM.

Appellant, The Raymond Bag Company, respectfully petitions this Honorable Court for Rehearing with respect to its order entered herein on April 2, 1956, granting appellee's motion to dismiss or affirm and dismissing this appeal for want of a substantial federal question.

The above order of dismissal followed the decision in the *Werner Machine Company* case, Number 63, October Term, 1955, holding the New Jersey corporate franchise tax proper as being a "bona fide franchise tax" and, therefore, not a prohibited tax upon tax exempt securities issued by the United States government which were included in the New Jersey franchise tax base. Said this Honorable Court in that case:

> "We find no basis in this instance for not accepting the State Court's conclusion that this tax is not imposed directly on the property held by the corporation."

The case at bar is like the *Werner* case in several aspects. The statute involved in each case expressly declares the tax imposed to be a franchise tax. Both statutes provide for the computation of the franchise tax on a basis of the net worth of the corporation. Both state courts treated the tax as a franchise tax in their decisions; the New Jersey Court went further to make a finding to the effect that the New Jersey tax was a bona fide franchise tax. Here the similarity between the two cases ceases.

The case at bar, unlike the *Werner* case, states ample factual grounds in its record upon which this court may declare that the so-called Ohio franchise tax is not in truth and in fact a bona fide franchise tax. As pointed out in the *Werner* decision, the name appended either by statute or judicial decision to a tax is not conclusive upon this court.

In the case at bar, the Ohio court disposed of the issues there presented (163 O. S. 275) upon the basis of its judgment in *Fifth Third Union Trust Company v. Peck,* 161 O. S., 169. There the Ohio court said:

> "The inclusion of federal securities in the tax base set up under Section 5498, General Code, would be consistent with the provisions of Section 742, Title

31, U. S. Code, that federal securities 'shall be exempt from taxation by or under state or municipal or local authority,' for the reason that the tax levied, under Sections 5498 and 5499, General Code, is a franchise tax based on the value of the capital stock and is not a tax on the securities as such."

This finding of the Ohio court that there is here involved a franchise tax based on the value of the capital stock, is predicated upon only a partial consideration of Section 5498 G. C. (R. C. 5733.05). True, Section 5498 G. C. provides that the tax base shall be the "value of the issued and outstanding shares of stock of every corporation required to file such report. * * *" But it continues: "For the purpose of this section, the value of the issued and outstanding shares of stock of any such corporation shall be deemed to be the total value as shown by the books of the company of its capital, surplus, whether earned or unearned, undivided profits and reserves but exclusive of" certain enumerated items. It is impossible to speculate what the state court would have decided as to the necessity for excluding United States government securities from the tax base if it had considered that the franchise tax is based on the "total value as shown by the books of the company of its capital, surplus * * * undivided profits and reserves * * *." The fact remains that it improperly considered only a part of the statute, and thereby imposed a prohibited tax contrary to federal law.

There is a vast and partinent difference between a franchise tax predicated upon corporate shares at a value and a franchise tax predicated upon net worth at book value. The Ohio statute chooses the latter criterion and not the former, and in administering this statute, the record in the case at bar (pages 36 through 47) discloses that the forms supplied and required to be used by the defendant-tax commissioner (R., 17, 24) specifically required the listing of all assets

including "U. S. bonds and tax notes" at book value. The determination, therefore, of the Ohio Court in *Fifth Third Union Trust Company v. Peck*, supra, that the franchise tax was based on the value of the capital stock is a half truth because of the limitation in Section 5498 General Code (R. C. 5733.05) upon the meaning of the phrase "value of the capital stock".

The effect of this difference is testified to in the case at bar by M. A. Roney, tax accountant of the Ernst and Ernst firm who prepared appellant's returns. He said in the course of analyzing the Tax Commissioner's forms, above referred to, (Appellant's Exhibits A through E) that the inclusion of the United States government tax notes in the tax base increases the tax in direct relation to the value of the federal securities themselves. Mr. Roney said in answer to the following question:

> "Q. Now, Mr. Roney, if you will strike out from page 3 of Exhibit A the item, 'U. S. bonds and tax notes, $131,626' * * * what effect does that have upon the amount of the tax which would be payable by the taxpayer to the state of Ohio? A. If that is stricken out, the net worth would be reduced and the tax base would be reduced in an exactly equal amount, and the tax would be reduced by the sum of $1 per thousand, times that amount.
>
> "Q. If the amount of federal securities owned by the company on December 1, 1947, had been double the amount that you have testified to here what would be the effect on the amount of tax paid? A. That would be the change. The tax would be increased by $131.63, or $1 per thousand, times the amount of the increase in the net worth." (R., 23, 24.)

This testimony demonstrates the direct incidence of the Ohio tax on federal securities. No such evidence appeared in the *Werner* case. Furthermore, *The Fifth Third Union Trust Company* decision, supra, is predicated on the propo-

sition that federal securities may be included in the tax base for the declared and avowed purpose of increasing the revenues of the state of Ohio in its general tax fund since the Ohio statute General Code Section 5491 (R. C. 5733.12) provides that the moneys resulting from the so-called franchise tax should go to the general fund of the state. In order to accomplish this, the Ohio court attempted to equalize the so-called franchise tax between those corporations which own federal securities and those corporations which do not own federal securities, the court saying specifically (161 O. S., 174, 175):

> "The exclusion of a major portion of the assets of one corporation, in determining the value of its franchise, because of the character of some of its investments, whereas all the assets of another corporation are included because it has no such investments, would not be fair or just.
>
> "Application of the principle announced in the Wrenn Paper Company case will result in absurd situations. In the instant case such application would mean that the capital accounts of each bank would have no taxable value and each would be relieved from paying any franchise tax except the minimum fee of $25. This was not the legislative intent."

The New Jersey court in its *Werner* decision, made no attempt to use federal securities in the tax base to equalize the franchise tax between those corporations who owned and those who did not own federal securities.

Accordingly, the case at bar can be distinguished from the *Werner* case in the following important aspects:

1. In the *Werner* case, the decision of this Honorable Court is that the franchise tax bears only indirectly and incidentally on the tax-exempt United States securities included in the New Jersey franchise tax base. In the case at bar, the Ohio franchise tax so-called, bears directly upon

the tax-exempt federal securities in the tax base. The purpose, intention and effect of taxing federals is apparent in the record (pages 19 through 31) in the case at bar. This evidence is uncontradicted, is real and substantial, and establishes, without cavil, the fact that the United States government securities under the Ohio franchise tax law directly bears the incidence of the tax. No such evidence exists in the *Werner* case.

2. In the *Werner* decision, no attempt was made by the New Jersey court through a partial and inaccurate reading and application of the tax statute to equalize the New Jersey franchise tax by specifically including federal securities in the tax base for the express purpose of increasing the revenues in the general fund of the state. In the case at bar, however, it is most apparent that the securities of the United States government owned by Ohio corporations are the object of the tax in its practical operation and effect, all for the declared purpose in the language of the Ohio court of avoiding discrimination in state taxation against corporations owning fewer federal securities than others. The reasoning of the Ohio court is to the effect that if a corporation owns federal securities, it must pay a tax upon those federal securities since otherwise it would pay a less tax than other corporations owning fewer or no federal securities. Let us suppose a situation where a corporation's assets were invested 100% in United States government securities and shown on the corporate balance sheet. Under such circumstances there can be no question but that the Ohio tax would be a direct tax and have an immediate and positive incidence upon the federal securities. The fact that the corporation may own less than 100% makes the tax no less direct and immediate in its incidence upon the federal

securities. The language of this Honorable Court in *Miller v. Milwaukee*, 272 U. S., 713 at 715, is pertinent here:

> "It is a familiar principle that conduct which in usual situations the law protects may become unlawful when part of a scheme to reach a prohibited result. If the avowed purpose or self-evident operation of a statute is to follow the bonds of the United States and to make up for its inability to reach them directly by indirectly achieving the same result, the statute must fail even if but for its purpose or special operation it would be perfectly good."

Stated in another way, the same result was reached in *Northwestern Insurance Co. v. Wisconsin*, 275 U. S., 136 at 139-141:

> "Counsel for State maintain that the effect of Section 76-34 is to impose upon domestic insurance companies a privilege or franchise tax, and not one on property or income; that no charge is laid upon bonds of the United States, but the fee exacted is for granted privileges, including exemption from personal property taxation and right to do business * * * and that in no proper sense can the challenged tax be regarded as one directly imposed upon gross income * * *.
>
> "* * * it has been the settled doctrine here that where the principal is absolutely immune, no valid tax can be laid upon income arising therefrom. To tax this would amount practically to laying a burden on the exempted principal. Accordingly, if the challenged Act, whatever called, really imposes a direct charge upon interest derived from United States bonds, it is pro tanto void.
>
> "* * * The distinction between an imposition the amount of which depends upon dividends or net receipts and one measured by gross returns is clear * * *.
>
> "Here the statute undertook to impose a charge of 3 per cent. upon every dollar of interest received by the Company from United States bonds. * * * This amounts, we think, to an imposition upon the bonds themselves and goes beyond the power of the State."

Not only does *The Fifth Third Union Trust Company* decision supra, attempt to justify taxation of federal securities on the ground that to not tax them would discriminate against corporations not owning federal securities but it also results in a discrimination against those domestic corporations which own federal securities for in this way corporations in Ohio are penalized for owning such securities. This legal reasoning of *The Fifth Third Union Trust Company* case, supra, and the factual situation upon which it was predicated are both entirely absent from the New Jersey *Werner* decision.

3. In the *Werner* case, there had been no prior history of conflicting interpretations of the New Jersey statutes regulating franchise taxation. In the case at bar, it must be noted that prior to *The Fifth Third Union Trust Company* decision, supra, the Ohio court in *Wrenn Paper Company v. Glander,* 156 O. S., 583 at 591, held that the Ohio franchise tax statute required General Code Sections 5498, 5328-1 and 5323 (R. C. 5733.05, 5709.02 and 5701.06) to be read together as being in *pari materia,* and that when so read together required United States government securities to be excluded from the franchise tax base because the so-called franchise tax had direct incidence thereon. Upon rehearing the Ohio court affirmed its former decision, 158 O. S., 15. Still later, the *Wrenn* case, supra, was overruled by the Ohio court's decision in *The Fifth Third Union Trust Company* case, supra. The effect of the *Wrenn* decision, supra, was twofold:

(1st) It found the so-called franchise tax to have a direct incidence on federal securities and, therefore, to be in conflict with federal law. Constitution of the United States, Article I, Section 8, Clause 2; 31 U.S.C. Sec. 742.

and

(2nd) It found that the state statutes required the exclusion of federal securities from the tax base thereby eliminating the conflict between the franchise tax and the federal law. In accomplishing this result, the Ohio court in the *Wrenn* decision, supra, read as being in pari materia, Sections 5323, 5328-1 and 5498, General Code (R. C. 5701.06, 5709.02 and 5733.05) all of which sections appeared in Title I, being the "This Title" referred to in General Code Section 5328-1 (R. C. 5709.02).

Subsequently, in *The Fifth Third Union Trust Company* case, supra, the Ohio court abandoned this interpretation of the Ohio statutes by overruling the *Wrenn* decision, supra, and again permitting federal securities included in the tax base to be subject to direct taxation in order, said the court, to equalize the tax among the several corporations of the state who owned varying amounts of federal securities and enabling and requiring corporations who owned federal securities to contribute larger sums to the general tax fund of the state. No such judicial history and consequent legal effect concerning the interpretation of the New Jersey franchise tax appears in the *Werner* decision. It is unique to Ohio. Such judicial history properly may be considered by this Honorable Court in determining whether the franchise tax is bona fide as such or whether it is a mere name cloaking an excise tax.

4. The method of administering the Ohio franchise tax indicates in practical operation and effect it is a tax on net worth. The employment of the word "franchise" in connection with the name of the tax will not change its essential nature. As this court has observed in a net worth tax case:

> "It matters not whether the tax is, as Appellee contends, an indirect or excise levy on net worth measured by corporate capital and surplus or is, as Appellant

urges, a tax on personal property based on a valuation gauged by capital and surplus. Our inquiry is narrowed to whether in practical operation and effect the tax is in part a tax upon federal bonds. We can only conclude that the tax authorized by Section 54:4-22, whether levied against capital and surplus less liabilities or against entire net worth, is imposed on such securities regardless of the accounting label employed in describing it."

New Jersey Realty Title Insurance Company case, 338 U. S., 665 at 673.

5. In the Werner decision, the Pennsylvania court held the tax to be a bona fide franchise, i.e., a tax upon a corporate franchise and not a tax upon net worth. This Honorable Court affirmed, saying there is no basis in this instance for not accepting the state court's conclusion.

But the Ohio decision in the case at bar, predicated as it is and disposed of upon the principles of *The Fifth Third Union Trust Company* case, supra, is, clearly a tax on net worth of appellant. Such a net worth tax, the record in the case at bar discloses, impinges directly upon federal securities. This Honorable Court recognizes the problem presented in such a situation in *New Jersey Realty Title Insurance Company,* 338 U. S., 665 at 673 and 674, a net worth case, where this Honorable Court said:

"It matters not whether the tax is, as Appellee contends, an indirect or excise levy on net worth measured by corporate capital and surplus or is, as Appellant urges, a tax on personal property based on a valuation gauged by capital and surplus. Our inquiry is narrowed to whether in practical operation and effect the tax is in part a tax upon federal bonds.

"The section here in question was not considered as imposing a tax on privilege or franchise by either the New Jersey Legislature or the taxing officials or by any of the Courts below. We are not limited by the state's characterizations of its tax * * * We likewise do not think the assessment can be sustained as one levied on a corporate franchise."

Since the Ohio tax is not a bona fide franchise tax, the principles announced in *New Jersey Title Insurance Company* case, supra, should be applied to the case at bar which presents a record predicated upon a state of facts permitting this Honorable Court to properly determine for itself, unhampered by state court determinations, whether the Ohio tax is as its name indicates, a franchise tax or, as the Ohio court has declared, a means for using a net worth tax to avoid state discrimination against corporations not owning federal securities by directly taxing federal securities in the tax base. The fact that this bears equally upon all assets appearing in the corporate net worth does not lessen the impact of the tax upon the federal securities also appearing in the net worth. It is believed that a substantial federal question is presented on this record which will justify and permit this Honorable Court to rehear the matter without in anywise affecting or disturbing the determination of the *Werner* case.

Wherefore, appellant prays for rehearing of its appeal in this matter and a reconsideration of this Honorable Court's order sustaining the motion of appellee to dismiss or affirm.

Respectfully submitted,

Wellmore B. Turner,
Guy H. Wells,
Hulman Bldg., Dayton 2, Ohio,
Counsel for Appellant.

Certificate of Counsel.

Dayton, Ohio, April, 1956.

The foregoing petition for rehearing is presented in good faith and not for delay.

Guy H. Wells,
Counsel for Appellant.

APPENDIX.

Section 5709.02 (5328-1)

(6 Baldwin's Ohio Revised Code and Service, Title 57)

All money, credits, investments, deposits, and other intangible property of persons residing in this state shall be subject to taxation, except as provided in this section or as otherwise provided or exempted in Title LVII of the Revised Code; but the good will, license, or franchise of a business, whether granted by governmental authority or otherwise, shall not be considered property separate from the other property used in or growing out of such business. Property of the kinds mentioned in section 5709.03 of the Revised Code, used in and arising out of business transacted in this state by or on behalf of a nonresident person, other than a foreign insurance company as defined in section 5725.01 of the Revised Code, and nonwithdrawable shares of stock of financial institutions and dealers in intangibles located in this state shall be subject to taxation; and all such property of persons residing in this state used in and arising out of business transacted outside of this state by or on behalf of such persons, and nonwithdrawable shares of stock of financial institutions located outside of this state, belonging to persons residing in this state, shall not be subject to taxation. Such property subject to taxation shall be entered on the classified list and duplicate of taxable property, or on the intangible property tax list in the office of the auditor of state and the duplicate thereof in the office of the treasurer of state.

A corporation shall not be required to list any of its investments in the stocks of any other corporation or in its own treasury stock.

Section 5701.06 (5323)

(6 Baldwin's Ohio Revised Code and Service, Title 57)

As used in Title LVII of the Revised Code, "investments" includes:

A. Shares of stock in corporations, associations, and joint-stock companies, under whatever laws organized or existing, excepting:

(1) Those which are instrumentalities of the federal government for the taxation of which by the several states no provision is made by act of the congress of the United States;

(2) Those in financial institutions, dealers in intangibles, and domestic insurance companies as defined in section 5725.01 of the Revised Code;

(3) Those defined as deposits by section 5701.05 of the Revised Code.

B. Interest-bearing obligations for the payment of money, such as bonds, certificates of indebtedness, debentures, and notes; certificates of deposit, savings, and other like deposits in financial institutions outside this state yielding income by way of interest or dividends in excess of four per cent of the principal sum withdrawable; and other similar evidences of indebtedness, whether negotiable or not, and whether or not secured by mortgage or lien upon real or personal property or income, by whomsoever issued, excepting those issued:

(1) By the United States or any of its territories, districts, or dependencies;

(2) By any instrumentality of the federal government;

(3) Prior to January 1, 1913, by the state of Ohio or any political or other subdivision or school district in this state;

(4) Pursuant to section 2a of Article VIII, Ohio Constitution;

(5) Which are defined in sections 5701.05 and 5701.07 of the Revised Code as deposits and current accounts.

C. Annuities, royalties, and other contractual obligations for the periodical payment of money and all contractual and other incorporeal rights of a pecuniary nature from which income is or may be derived, however evidenced, excepting:

(1) Interests in land and rents and royalties derived therefrom, other than equitable interests divided into shares evidenced by transferable certificates;

(2) Contracts of employment or partnership, salaries, wages, commissions, seniority and other incorporeal rights derived from any such contract, and retirement annuities or plans that result from contracts of employment;

(3) Contracts of insurance, and dividends paid or applied thereunder; but dividends under contracts commonly known as "combination life and annuity policies" or "cash refund annuities" shall not be excluded from taxation;

(4) Stock purchase, pension, or profit-sharing plans established by an employer for the benefit of his employees or those of his subsidiaries.

D. All equitable interests, life or other limited estates, and annuity interests in any investment described in this section, or in any fund made up in whole or in part of any such investments, wherever located.